

The Hon. Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ESTHER HOFFMAN; SARAH DOUGLASS;
ANTHONY KIM; and IL KIM and DARIA
KIM, husband and wife and the marital
community comprised thereof, on behalf of
themselves and on behalf of others similarly
situated,

Plaintiffs,

vs.

TRANSWORLD SYSTEMS INCORPORATED;
PATENAUDE AND FELIX, A.P.C.;
MATTHEW CHEUNG, and the marital
community comprised of MATTHEW CHEUNG
and JANE DOE CHEUNG; NATIONAL
COLLEGIATE STUDENT LOAN TRUST
2004-2; NATIONAL COLLEGIATE STUDENT
LOAN TRUST 2005-2; NATIONAL
COLLEGIATE STUDENT LOAN TRUST
2005-3; NATIONAL COLLEGIATE STUDENT
LOAN TRUST 2006-1; NATIONAL
COLLEGIATE STUDENT LOAN TRUST
2006-3; NATIONAL COLLEGIATE STUDENT
LOAN TRUST 2007-4,

Defendants.

Case No. C18-1132 TSZ

PLAINTIFFS' MOTION FOR
RECONSIDERATION OF
JANUARY 26, 2023 ORDER
DENYING CLASS CERTIFICATION
AND GRANTING IN PART
MOTION FOR SUMMARY
JUDGMENT

ORAL ARGUMENT REQUESTED

NOTED FOR CONSIDERATION:
February 9, 2023

I. RELIEF REQUESTED

Plaintiffs move for reconsideration of portions of the Court's January 26, 2023 Order. Dkt. #403 ("Order"). Plaintiffs ask the Court to reconsider its Order granting Defendant Trusts' Motion for Summary Judgment dismissal of Plaintiffs' request for injunctive relief and denying Plaintiffs' Motion for Class Certification. Order at 13-19 and 33-36.¹

Reconsideration of the Order is warranted because there was clear legal error.

II. ARGUMENT

A. Legal Standard

Reconsideration under Rule 59(e) and LCR 7(h) will be granted upon a "showing of manifest error in the prior ruling." *Neil Jones Food Co. v. Factory Techs., Inc.*, No. C21-5073 MJP, 2021 U.S. Dist. LEXIS 162872, at *3 (W.D. Wash. Aug. 27, 2021). A court's failure to correctly apply law to facts is an example of manifest error. *See Grae-El v. City of Seattle*, No. C21-1678JLR, 2022 U.S. Dist. LEXIS 73913, at *4-5 (W.D. Wash. Apr. 21, 2022).

B. The Court Erred in Dismissing Plaintiffs' Request for Injunctive Relief Against the NCSLTs

The Court should reconsider its ruling dismissing Plaintiffs' request for injunctive relief against the Trusts because it was based on a misapplication and misunderstanding of Washington law. First, the Court's Order misapplied *McDonald v. OneWest Bank, FSB*, 929 F. Supp.2d 1079 (W.D. Wash. 2013) to the Plaintiff's claims, which have nothing to do with foreclosure or Washington's Deed of Trust Act (DTA). *McDonald* concerns the right of a

¹ The Order resolved numerous motions by the parties including Plaintiff's Motion for Class Certification (Dkt. # 232) and Defendants' three summary judgment motions (Dkt. ## 284, 369 and 377). Plaintiffs do not concede any of the rulings adverse to their positions, but seek only reconsideration of the portions of the Order regarding the Trusts' Motion for Summary Judgment dismissing Plaintiffs' requested injunctive relief and denying Plaintiffs' Motion for Class Certification.

1 bank to foreclose on a mortgage under the DTA. *See id.* at 1086-89. The court held that
 2 OneWest Bank violated the DTA when it sent a notice of default starting the foreclosure
 3 process when it did not hold the promissory note. *Id.* at 1087-88. In finding that “a permanent
 4 injunction [under the DTA] precluding all future foreclosure actions” was not appropriate,
 5 the court reasoned that even if the Plaintiff could prove that the note was lost, barring a non-
 6 judicial foreclosure, OneWest Bank could still foreclose through a judicial foreclosure. *Id.* at
 7 1088.

9 Under U.C.C. Article 3, which applies to the foreclosure of real property, the holder
 10 in possession of a negotiable instrument may enforce it. *Deutsche Bank Nat. Tr. Co. v.*
 11 *Slotke*, 192 Wash. App. 166, 177, 367 P.3d 600, 606 (2016); RCW 62A.3-301. Thus, there
 12 was no need for OneWest Bank to prove ownership or assignment to foreclose on
 13 McDonald’s home. *See Merry v. Quality Loan Serv. Corp. of Washington*, 2015 WL
 14 5022967 * 7, 189 Wash. App. 1045 (2015) (unpublished). In contrast, the Trusts are not
 15 seeking to foreclose on a security interest and must prove assignment to collect on the
 16 Plaintiffs’ student loans. U.C.C. Article 3 does not apply to the alleged student loans here, as
 17 it did to the deed of trust in *McDonald*. The holder rule is irrelevant. The student loan
 18 contracts at issue here are not negotiable instruments, and originated with Bank of America
 19 and JP Morgan Chase, fka Bank One.

21 In order for the Trusts to legally collect in Washington on the debts they claim they
 22 own they must have a written assignment of the loans signed by the originating banks. RCW
 23 4.08.080 provides:
 24

25 Any assignee or assignees of any ...chse in action, for the payment of
 26 money, by assignment in writing, signed by the person authorized to make the
 same, may, by virtue of such assignment, sue and maintain an action or

1 actions in his or her name, against the obligor or obligors, debtor or debtors,
 2 named in such judgment, bond, specialty, book account, or other chose in
 3 action, notwithstanding the assignor may have an interest in the thing
 4 assigned.

5 An assignee of a chose in action, which each Trust claims to be, can only file suit in its own
 6 name to collect the assigned debt if it has proof of assignment in writing *signed by the*
 7 *assignor. MRC Receivables Corp. v. Zion*, 152 Wash. App. 625, 627, 218 P.3d 621, 622
 8 (2009). The alleged assignee of a claim cannot through its own self-serving declaration prove
 9 that it was assigned a loan. *Id.* at 630.

10 Origination records, credit agreements, note documents and payment information is
 11 irrelevant to the proof of assignment required.² The only issue before the Court is whether
 12 the Trusts can authenticate the Schedules. If they cannot, they cannot collect on Plaintiffs'
 13 student loans. A future injunction against the Trusts is not "debt forgiveness." Even if the
 14 Trusts fail to prove they have the legal ability to enforce these student loans at trial and the
 15 Court enjoins them from future collection attempts, the injunction would only apply to the
 16 Trusts. The injunction requested in *McDonald* would have barred all future attempts to
 17 foreclose. Here, if the original banks can prove they own the loans, the injunction will not bar
 18 them from collecting.

19 Moreover, the Order dismissing Plaintiffs' requested injunction suffers from an
 20 internal contradiction. The WCPA provides: "Any person who is injured in his business or
 21 property by a violation of RCW 19.86.020. . . may bring a civil action in the superior court to
 22 enjoin further violations...." RCW 19.86.090. A plaintiff need not prove the possibility of a
 23 future injury to themselves to obtain an injunction barring a defendant from future conduct
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² Even if relevant, there is no evidence the Trusts segregate by Trust account records.

1 that violates the WCPA. *Hockley v. Hargitt*, 82 Wash.2d 337, 350, 510 P.2d 1123, 1132
 2 (1973). Plaintiffs need only establish the possibility of future violations of the WCPA. *Id.*

3 Commission of an unfair or deceptive act or practice in the conduct of any trade or
 4 commerce is a violation of RCW 19.86.020. The Court found Plaintiffs could establish the
 5 Trusts engaged in unfair or deceptive conduct because Plaintiffs “have presented evidence
 6 from which a reasonable jury could conclude that the NCSLTs lack a complete chain of
 7 assignment demonstrating their ownership of Plaintiffs’ loans.” Order at 21-26. Because the
 8 Court has concluded that the Defendants’ collection on Plaintiffs’ loans without complete
 9 chain of assignment could be unfair or deceptive, and the WCPA permits Plaintiffs to obtain
 10 injunctive relief enjoining future unfair or deceptive conduct, the Court should not have
 11 granted the Trusts’ motion to dismiss the injunctive relief Plaintiffs requested. If the
 12 Plaintiffs can show that the Trust do not have the required proof of assignment, the
 13 possibility the Trusts will engage in future unfair attempts to collect exists, and an injunction
 14 is appropriate. Thus, summary judgment dismissal of Plaintiffs’ prayer for injunctive relief
 15 barring future violations of the WCPA, based solely on the Court’s speculation (without
 16 evidence) that the Trusts in the future may be able to prove their ownership of the loans, was
 17 manifest error. Plaintiffs are entitled to the opportunity to show that the Trusts cannot prove a
 18 complete chain of assignment, as the Court has already ruled there is an issue of fact
 19 regarding whether the Plaintiffs can make such a showing.
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23 **C. Common Questions Regarding Assignment Make the Order Denying**
 24 **Certification Manifest Error**

25 The Order denying certification was manifest error because there are common
 26 questions that predominate and the Plaintiffs’ facts are typical of those of members of the

1 proposed Class. The Order focuses generally on ownership of the loans. But Plaintiffs'
2 claims are not general, they are very specific. Plaintiffs contend that Defendants collected on
3 student loans without the ability to authenticate the Schedules necessary to prove assignment.
4 This claim results in at least two common questions, the answers to which will drive the
5 resolution of Plaintiffs' and all Class members' claims. The first, a purely legal question, is:
6 "As a matter of law, is it unfair for the Defendants to collect on the Plaintiffs' and Class
7 members' student loans if they cannot authenticate the Excel spreadsheets as the Schedules?"
8 The second, a mixed question of law and fact, is: "Can the Defendants prove the Excel
9 spreadsheets are the Schedules?" The answers to these questions resolve the WCPA claims
10 of all putative Class members.
11

12 The Court's decision denying certification rests on the incorrect hypothesis that
13 "[i]ndividual inquiry is required to determine whether TSI or the NCSLTs can present
14 sufficient documentation to support *ownership* of each class member's loan." Order at 18
15 (emphasis added). As the Court notes, "[a] plaintiff [bringing a WCPA claim alleging an
16 unfair or deceptive act or practice] ... 'can establish injury based on unlawful debt collection
17 practices even where there is no dispute as to the validity of the underlying debt.'" Order at
18 28. Plaintiffs allege that it is unfair for the Defendants to collect on the debts Defendants
19 allege the Trusts own because they cannot prove assignment. This question turns on whether
20 Defendants can authenticate six Excel spreadsheets. Thus, the inquiry is only into six
21 documents, not every individual loan. The Court's observation that "a finding that any of the
22 six Excel spreadsheets were modified after the effective dates listed in the corresponding
23 Pool Supplements does not mean that the NCSLTs do not own the putative class members'
24 loans" (Order at 18), may be correct, but it is also irrelevant to whether certification should
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1 be granted. The issue is whether unfair or deceptive collection conduct occurred, which turns
 2 on whether it is unfair or deceptive for the Defendants to collect on loans when they cannot
 3 authenticate the records they must possess to prove the complete chain of title.

4 Regarding the false affidavits, this also does not require an inquiry into each
 5 individual loan. The Generic Affidavits contain statements of alleged personal knowledge of
 6 documents that the affiants could only have if they received training necessary to give them
 7 that personal knowledge. Defendants claim the Affiants all received uniform training and the
 8 Generic Affidavits were created from templates. Whether the representations of personal
 9 knowledge alleged in the Generic Affidavits are true or misleading requires an inquiry into
 10 Defendants' training and the information TSI communicated to Affiants. It does not require
 11 an individual inquiry into each loan. James Cummins testified that the Affiants did not
 12 review the loan schedules prior to signing the Generic Affidavits and did not have the
 13 personal knowledge they stated they had in them. He did not testify that the lack of personal
 14 knowledge applied only to "some" loans. Dkt. #240. There is thus a common question, the
 15 answer to which resolves Plaintiffs' and the Class members' WCPA claims relative to the
 16 Affidavits: "Did TSI's training and processes provide Affiants the personal knowledge
 17 alleged in the Affidavits?" Answering this question does not require determining whether the
 18 Trusts own the loans; Defendants can violate the WCPA and the FDCPA even if they own
 19 the loans, if they use unfair or deceptive affidavits that falsely claim personal knowledge to
 20 collect on them. *See Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 56-57, 204 P.3d
 21 885, 899 (2009); *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529
 22 (2014). Owning the loans—if the Trusts do—does not give the Defendants the right to make
 23 misrepresentations to courts and consumers to collect on them. If it did, there could never be
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1 a violation of the WCPA or FDCPA in a collection action where the collecting party owns a
 2 loan. The issue in this case is not who owns the loans; it is whether the collection practices
 3 the Defendants employed to collect the loans was unfair and/or deceptive.

4 Regarding predominance, the common questions above predominate over any
 5 individual issues regarding the ownership of each loan. The claims Plaintiffs seek to certify
 6 will succeed or fail depending on whether Defendants can authenticate the Schedules
 7 necessary to prove assignment and TSI practices regarding affidavits.
 8

9 Regarding whether the relief Plaintiffs seek primarily monetary relief, this too is
 10 irrelevant to class certification. The Plaintiffs seek an injunction, and the monetary relief is
 11 dependent on a finding that Defendants engaged in the unfair or deceptive conduct Plaintiffs
 12 seek to enjoin under the WCPA.
 13

14 III. CONCLUSION

15 For the foregoing reasons, Plaintiffs request the Court to reconsider the Order to
 16 permit Plaintiffs' request for an injunction barring the Trusts from collecting on the loans
 17 they claim to own but for which they cannot prove they obtained written assignments, and to
 18 certify the proposed Class.

19 DATED: February 9, 2023

20 *We certify that this motion contains 2077 words, in compliance with the Local Civil Rules.*

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